86-1215

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

- versus -

ENRIQUE MALDONADO,
Respondent.

PETITION

For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

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125 pp

- QUESTIONS PRESENTED -

1. Whether a person claiming a violation of the Federal Safety Appliance Act involving coupling operations meets the requisite statutory burden of proof by merely showing that one of the drawbars was properly aligned, or whether the Federal Safety Appliance Act requires that a person claiming the violation must prove that both of the drawbars which are necessary for a coupling operation be properly aligned and that at least one of the knuckles on one of these drawbars be open?

2. Whether Petitioner's due process rights to a fair and impartial trial were violated when the district court denied Petitioner the right to obtain evidence from a juror to show that one or more jurors lied and/or concealed prejudices and preconceived ideas about the case during voir dire?

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MISSOURI PACIFIC RAILROAD COMPANY
Petitioner,

- versus -

ENRIQUE MALDONADO,
Respondent.

- PETITION -

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Missouri Pacific Railroad Company, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on the 27th day of August, 1986.

- OPINIONS BELOW -

The verdict of the jury is attached hereto in Appendix A, infra, pages 37a to 40a. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and a true and correct copy is printed in Appendix A, infra, pages 1a to 36a. A copy of Petitioner's Motion for Rehearing before the United States Court of Appeals for the Fifth Circuit is attached in Appendix A, infra, pages 43a to 22 . The Order Denying Petitioner's Motion for Rehearing before the United States Court of Appeals for the Fifth Circuit is attached in Appendix A, infra, page 23 .

- JURISDICTION -

The judgment of the Court of Appeals was entered on August 27, 1986. Petitioner herein timely filed a motion for rehearing which was denied on October 1, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the Federal Safety Appliance Act, 45 U.S. C. §2, which provides as follows:

> It shall be unlawful for any common carrier engaged in interstate commerce by a railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be

> uncoupled without the necessity of men going between the ends of the cars.

Additionally, this case involves Federal Rule of Evidence 606(b) which provides as follows:

> Inquiry into validity of verdict or indictment.
> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to ascend or descend from the verdict or indictment concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was properly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

This case also involves the Fifth Amendment of the United States Constitution which reads as follows:

> No person shall be held to answer for a capitol or otherwise infamous crime, unless in a presentment or indictment of the grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- STATEMENT OF THE CASE -

This is a lawsuit which was brought pursuant to Title 45 U.S.C.S. §2 of the Federal Safety Appliance Act (F.S.A.A.) and jurisdiction in the trial court was

based on diversity of citizenship pursuant to the provisions of Title 28 U.S.C.S. §1332(a)(1). The Respondent sought damages for alleged injuries to his lower back which allegedly were caused when he attempted to align a drawbar on one of Petitioner's cars. The Respondent was assigned to "switch" railroad cars and couple them together so that the cars were arranged in a specified order. Each of the railroad cars were equipped with drawbars which contained automatic couplers, which were designed to couple on impact. When one of the cars failed to couple, the Respondent noticed that each of the cars which were being coupled was grossly misaligned. During repeated attempts to align the drawbar on one of the cars, the Respondent claimed that he sustained the injuries which were

the subject of the lawsuit. At the commencement of the trial, Respondent's suit included claims both under the Federal Safety Appliance Act and the Federal Employers Liability Act but after the trial commenced the F.E.L.A. claim was dismissed. The jury's verdict resulted in Respondent being awarded $834,250.00 with interest thereon from January 11,1985, at 9.08 per annum.

THE EVIDENCE

The evidence at the trial showed that the Respondent was a member of a four-men crew engaged in switching operations at the Missouri Pacific's train yard in Laredo, Texas. The Respondent was one of the crew members who was assigned to assist in making up an outbound train by linking specified cars together in accordance with a switchlist.

In making up this train, the crew was required to switch a TTX flatcar from Track No. 6 to Track No. 4 and to link it up with cars already on Track No.4. The engine then came southward on to Track No. 4 with the purpose of "throwing" or "kicking" the TTX car down the track to couple with those cars already on the track. Both the TTX car and the car to which it was to be connected were equipped with drawbars which had automatic couplers designed to connect upon impact. Before kicking the TTX car down the track, the Respondent Maldonado only observed that the TTX drawbar was properly aligned and he opened the knuckle on the coupler. However, there is absolutely no direct or circumstantial evidence that the drawbar on the second car was properly aligned. Likewise, there

is no evidence that the knuckle on the drawbar on the second car was open or closed. The evidence is undisputed that in order to have a successful coupling, that both drawbars on both cars had to be properly aligned with at least one of the knuckles open on one of the drawbars. There is no evidence that both drawbars were properly aligned prior to the attempted coupling operation. After the TTX car was sent down the track, the Respondent heard the TTX car strike the next car but an unsuccessful coupling resulted. Thereafter, it was noticed that the TTX car had failed to couple with the second car in line and the Respondent saw that the drawbars on both of the cars were grossly misaligned. The Respondent then successfully aligned the drawbar on the second car and attempted

to align the drawbar on the TTX car but was unable to do so. He then signaled to another crew member who came to assist him. They then jointly attempt to align the TTX drawbar and during the second attempt to align it, Maldonado claims that he received injuries to his back.

THE RULINGS BELOW

a) Safety Appliance Act Burden

The Petitioner objected to the trial judge's instruction to the jury which told them that it is a violation of the Safety Appliance Act "for the railroad to operate a car which has a drawbar sufficiently out of line that it does not couple upon impact." (S.F.P.665) The Petitioner timely objected to the court's instruction both before and after the court had read it to the jury but the court refused to withdraw the instruction.

The Petitioner tendered to the court a written instruction in accordance with this Court's decision in the 1950 case of Affolder v. New York C. & St.L.R.Co., 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950). The Petitioner on appeal argued that the trial court's instruction was prejudicial and an erroneous statement of the law because it is contrary to the rules established by this Court in the Affolder and the later case of Cobb v. Union Railway Company, 318 F.2d 33 (6th Cir. 1963)). Petitioner has argued that the jury was left with the erroneous impression that evidence of a mere misalignment of a drawbar establishes a violation of the Federal Safety Appliance Act and it imposed a more onerous burden on the Petitioner in operating its railroad cars than those required by law,

and lessened the Respondent's burden under the Safety Appliance Act. Petitioner did not have the burden to show a separate cause for the failure to couple.

The Petitioner's counsel prior to the charge of the jury requested in writing that the court charge the jury as follows, viz:

> You are further instructed that the mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted and aligned as such automatic couplers must be, the failure is not that of a coupler.

The Respondent failed to meet his basic burden of establishing the essential requirement of coupling because the undisputed evidence shows that only one of the two drawbars was properly

aligned and that only one knuckle was open. It was Respondent's burden to prove that each of the drawbars (including the second car drawbar) was properly aligned prior to the attempted coupling since those facts are a requirement for a successful coupling. The Court of Appeals for the Fifth Circuit erroneously placed the burden on the Petitioner to establish that there was a misalignment prior to the attempted coupling.

b) Jury Deliberations and Rule 606(B)

After the verdict was rendered in this cause, a juror named Narcisa C. Valdez, on her own contacted counsel for the Petitioner and informed him that the other jurors had substantial and meaningful discussions during their

deliberations regarding the corporate defendant's wealth in comparison to the Respondent's indivdual wealth, that they should be "sympathetic" to the Respondent, and the fact that the "benefit of the doubt" should be given to the Respondent in this case. As soon as counsel was informed of this, Petitioner's counsel filed with the trial court a Motion for Leave to obtain the affidavit of Narcisa C. Valdez or in the alternative to take the deposition of Narcisa C. Valdez in order to incorporate same in defendant's Motion for New Trial. The trial court denied this motion on the basis that Petitioner's motion was foreclosed by the express language of Rule 606(b) of the Federal Rule of Evidence and the case of

Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981). Petitioner objected to the court's ruling on the basis that Petitioner had the right to be tried by a fair and impartial jury, and this evidence would clearly show that one or more jurors concealed their biases and prejudices during the voir dire examinations. The matters which the jurors discussed were matters which Petitioner's counsel directly inquired into during his limited voir dire examination.

REASONS FOR GRANTING THE WRIT

The Certiorari should be granted to resolve conflicts in principles among the lower courts, and to clarify the present state of the law with regards to the Federal Safety Appliance Act as it applies to draw-bar cases, and to further clarify that Rule 606(b) was not designed to shield jurors from being examined as to matters which they con-

cealed during voir dire examination, and have same properly applied to this case.

The law with regards to the Federal Safety Appliance Act as it applies to automatic couplers is unclear in that the current decisions do not clearly define whether or not a prerequisite to making a case under the Federal Safety Appliance Act involving couplers requires that the plaintiff at least prove that both of the drawbars on the cars to be coupled be properly aligned and that at least one of the knuckles on one of the drawbars be open prior to any attempted coupling.

1. Safety Appliance Act Issue

In this case the trial court erroneously instructed the jury that it was a violation of the Safety Appliance Act for "the railroad to operate a car which has a drawbar sufficiently out of line that it does not couple upon impact." The court

further instructed the jury and said that "the failure of the equipment to perform properly on the occasion in question is itself a violation." Furthermore, the court said that the only issue is whether the drawbar worked on that occasion or did not (S.F. P.665). Counsel for Petitioner strongly objected to these instructions and requested that the Affolder instruction which was defined by this Court in 1950 be given to the jury. Petitioner tendered to the trial court a written instruction in accordance with Affolder prior to the Charge being read to the Jury and then after the Charge had been read to the Jury. The requested instruction was as follows:

> You are further instructed that the mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not

> adjusted and aligned as such coupler must be, the failure is not that of the coupler.

The evidence at the trial was clearly void of any evidence which established that both drawbars were properly set and aligned prior to the attempted coupling.

This Honorable Court in Affolder clearly said that "if the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened" then the railroad had a good defense. The Affolder court recognized that all of the conditions necessary for a successful coupling must exist before one can place the responsibility on the railroad and find Federal Safety Appliance Act violation. Judge Jackson in the Affolder opinion in his dissent noted that the charge gave the jury the impression that it need only find two cars failed to couple on impact to establish a violation of the Safety Appliance

Act. This simply is not the law and before a failure to couple can establish that there was a defective coupler the injured employee must establish that at least one of the couplers and both drawbars had been properly aligned so that a successful coupling operation was even possible. It follows from the Affolder case that if the couplers were not adjusted as automatic couplers must be in order to have all of the prerequisites for coupling, then the failure of the cars to couple is not that of the device, and liability should not lie on the railroad.

In Cobb v. Union Railway, 318 F.2d 33 (6th Cir. 1963) the Sixth Circuit approved Affolder and held that the judge properly instructed the jury that if the couplers failed to couple automatically because they were not properly set that such failure would not be a violation of the Safety Appliance Act. The Court clearly noted by using the

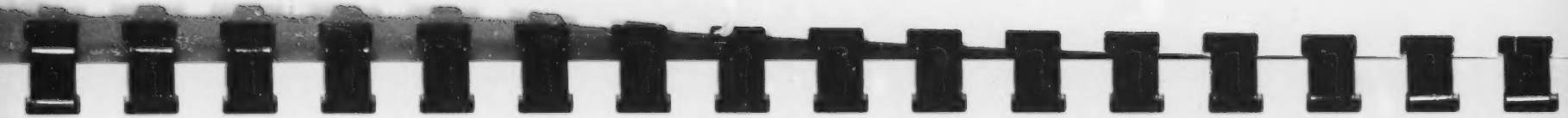
word "they" that the plaintiff has the burden of showing that the couplers (plural) were in a proper position for coupling at the time of the attempted impact for coupling. In this case the Respondent failed to meet the burden of proof as set out by the Cobb court in that there is absolutely no evidence to indicate that both couplers were a proper position for coupling prior to the attempted coupling.

The Fifth Circuit Court of Appeals in its decision in this case place a greater burden on Petitioner railroad than required by law by requiring that the railroad establish the cause of the misalignment and that the railroad prove that the couplers were not in a position to effectuate a coupling prior to coupling. Counsel for the railroad at the trial attempted to offer evidence to show that there was no defect on the coupler mechanisms upon an inspection after the alleged incident but the trial

court refused to permit counsel to offer such evidence on the grounds that evidence of a defect in a coupler is not relevant in a Federal Safety Appliance Act case.

2. Rule 606(b) Issue

The writ for certiorari should also be granted on the further grounds that the Supreme Court's recent decisions concerning post trial hearings with jurors to determine biases or prejudices in criminal cases should be extended also to civil cases. The factual basis which leads to the Petitioner's request that the trial court permit counsel to obtain an affidavit from one of the jurors is that such evidence is not the type of evidence which is protected by Federal Rule of Evidence 606(b) and furthermore, that the Petitioner was denied a fair opportunity to present his case to a group of lay persons who were properly selected and screened for bias, but who



intentionally failed to disclose such biases and prejudices. The evidence which Petitioner's counsel attempted to obtain was evidence to substantiate that the juror's actions involved a concealment of material facts during voir dire and thus denied the Petitioner of due process and a fair trial. The recent decisions of this Court have effectively centered around a truth finding proceeding and the emphasis on post trial hearing of jurors has been to determine the actual impact on jurors of juror statements during voir dire and their compatibility with the purpose of Rule 606(b).

After the verdict was rendered in this case, a juror on her own called Petitioner's counsel and expressed great concern over the extensive and substantial discussions had in the jury room during their deliberations regarding "the relative wealth" of the parties that the jurors were "sympathetic"

to Plaintiff and concerns over giving the individual Plaintiff the benefit of the doubt over Petitioner Corporation, and not treating the corporate Defendant the same as an individual. These areas were the subject direct inquiry by Petitioner's counsel and by the court during voir dire and none of the jurors expressed in answer to direct inquiry that they had any such biases or prejudices.

The Fifth Circuit in its decision stated that Petitoner's counsel was attempting to impeach the jury's verdict by attempting to get into the subjective thoughts and emotions regarding the jurors' deliberations which are shielded by Rule 606(b). However, Petitioner's attempts to get an affidavit from juror Valdez were directed not at getting into the mental processes of the jury's deliberations, but rather to establish that one or more of the

jurors did not disclose in direct response to questions during voir dire by both Petitioner's counsel and the court certain prejudices or beliefs which were directly inquired about by Petitioner's counsel during voir dire. The unsolicited information which was given to Petitioner's counsel by juror Valdez was information which came after a juror voluntarily called Petitioner's counsel expressing concern over the nature of the deliberations in the jury room and its influence over the ultimate verdict. The information which Petitioner's counsel was furnished and which he attempted to preserve by means of an affidavit related specifically to statements which clearly establish that in fact one or more jurors let sympathy play a part of their deliberations and were of the conscious belief that corporations should be treated differently than individuals. Such belief by one or

more jurors certainly constituted a prejudice which was not disclosed during the voir dire by the Petitioner and the court. This Honorable Court in the case of Clark v. United States, 289 U.S. 1, 7-18, 53 S.C. 465, 468 77 L.Ed. 993, 1001-1002 (1932) expressly held that if answers to questions during voir dire are willfully evasive or knowingly untrue, the talisman, when accepted is a juror in name only. The evidence which was to be preserved by Petitioner's counsel were statements which are not protected by Rule 606(b), and therefore, do not constitute any type of an inquiry into the mental processes but rather evidence which would establish the jurors were jurors in the name only as set out by this Court in the Clark v. United States case and that this denied Petitioner his right to a fair and impartial jury.

If Rule 606(b) is expanded to protect beliefs or biases not disclosed during voir dire then there is absolutely no remedy to counsel and litigants when prospective jurors fail to disclose biases, prejudices and beliefs which later are held against a party to the litigation. The extension of the application of Federal Rule of Evidence 606(b) to prohibit the disclosure of facts to establish that one or more jurors lied during voir dire is a violation of the due process rights guaranteed in the Fifth Amendment of the United States Constitution because their is no legal remedy or opportunity for a hearing to review such misconduct by a juror. A litigant who is affected by such conduct has no opportunity to have such wrongful conduct reviewed, and consequently is deprived of his property without due process of law. The trial court's

application of Federal Rule of Evidence 606(b) to protect statements made by jurors, which clearly show that one or more jurors lied or concealed relevant and material information during voir dire constitutes a violation of Petitioner's constitutional right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

Although Rule 606(b) was designed to prevent juror harassment and promote the finality of verdicts, it was not drafted to immune or shield jurors who elect not to disclose obvious prejudices and biases during voir dire when expressly inquired into by counsel and then have those same jurors seek the protection of Rule 606(b) with regards to their failure to disclose their biases and prejudices. The intent of Rule 606(b) is to prevent jurors from

impeaching their own verdict, but the intent is not to protect veniremen who fail to disclose prejudices and biases during voir dire and then reveal such prejudices during jury deliberations at a point in the trial where counsel and litigants who with a strict application of Rule 606(b) have no remedy or review of jurors' failure to disclose such prejudicial information during voir dire. This Court in McDonnough Power Equipment, Inc. v. Greenwood case, 104 S.C.845,78 LEd.2d 663 (1984), which involved the claim that a juror had failed to answer truthfully a voir dire question about whether or not a member of his family had ever sustained a severe injury, established the following as the test to be applied:

> A party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further

> show that a correct response would have provided a valid basis for a challenge for cause. The motive for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

The Supreme Court of Montana in State v. Stafford, 678 P. 2d 644 (Montana 1984) also held that Rule 606(b) does not apply to a case where a juror concealed facts during voir dire, and such an inquiry is not an attack on the validity of a verdict. The trial court in this case erred in not permitting Petitioner's counsel to do the same.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit at docket number 85-2164

Respectfully submitted,

Donato D. Ramos

DONATO D. RAMOS
Attorney for Petitioner

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
August 27, 1986

Enrique Maldonado v. Missouri Pacific Company, No.85-2164
Before Randall, Garwood, Circuirt Judges, and Schwartz,Jr., *District Judge.

GARWOOD, Circuit Judge.

SUMMARY

Railroads/Jury

Appeal from a judgment for an employee under the Federal Safety Appliance Act (FSAA). Affirmed.

Appelle Enrique Maldonado (Maldonado) was employed as a switchman by the appellant, Missouri Pacific Railway Company (Missouri Pacific). He was

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*District Judge of the Eastern District of Louisiana, sitting by designation.

assigned to "switch" railroad cars and couple them together so that the cars were arranged in a specified order. The cars were equipped with drawbars which contained automatic couplers, designed to couple on impact. When one of the cars failed to couple, Maldonado noticed that both drawbars were misaligned. In attempting to align the drawbar on one of the cars, he injured his back. He filed an action against Missouri Pacific seeking compensation under the FSAA and the Federal Employers Liability Act(FELA), but dismissed the later action during trial. He obtained a favorable jury verdict on his FSAA claim.

(1)To avoid the great risks incurred by railroad employees going between cars the FSAA requires to automatic couplers

and imposes absolute liability upon a railroad for injuries sustained when the automatic couplers fail to perform "on the occasion in question." (2)One defense to the FSAA is available if the coupler equipment is in place, but the coupler was not placed in a position to operate. (3)Because the FSAA is essentially an quipment safety status, drawbar misalignment is due to some factor other than equipment failure or defect. (4)But, for a railroad to raise a defense of misalignment it must, at the least, produce evidence tending to show that the misalignment was not due to equipment failure or defect. Evidence that the drawbars were misaligned so as to prevent coupling places a burden on the railroad to produce evidence tending to show a separate cause for the failure to couple.

Because Missouri Pacific did not produce any evidence that would sustain an instruction on such a defense, the district court did not err in not instructing the jury on this issue.

(5)The district court had broad discretion in deciding whether to grant to new trial based on juror misconduct on the strength of statements by a juror that the jury had substantial discussions concerning the defendant's wealth. (6)The court did not abuse its discretion in denying the new trial motion or in denying the defendant the opportunity to obtain a statement from the juror. The party seeking to question jurors post-verdict must make a preliminary showing of misconduct, and the defendant made no suggestion to the court that the

juror would testify concerning any extraneous prejudicial information or outside influence on the jury. (7)Missouri Pacific argues that the jurors should have disclosed their prejudices in response to defense counsel's voir dire questions, but Missouri Pacific did not indicate in its motion that any juror believed he would be unable to treat the railroad fairly, yet concealed that fact during voir dire. The testimony sought by Missouri Pacific clearly concerned matters shielded from inquiry. (8)Missouri Pacific argues that not allowing them to question the juror violated its due process right to a fair and impartial jury, but the subjective thought processes of the jurors generally do not amount to jury misconduct that can support a new trial motion. (9)The

defendant's right to a fair trial is not absolute, it may be outweighed by other considerations, including the jury's right to privacy and protection from harassment.

(10)The district court's refusal to grant a new trial based on an improper remark by the plaintiff's attorney in his closing argument was not an abuse of discretion when the court issued curative instructions and the defense attorney failed to move for a mistrial. (11)The district court has broad discretion in limiting cross-examination, and did not err in limiting cross-examination regarding Maldonado's contributory negligence after for FELA cause of action was dropped.

OPINION

WILL GARWOOD, Circuit Judge:

Defendant Missouri Pacific Railroad Company appeals from a judgment in favor

of its employee, plaintiff Enrique Maldonado, who sued Missouri Pacific under the Federal Safety Appliance Act (FSAA), 45 U.S.C. §2, for injuries he sustained in attempting to align a drawbar on one of defendant's railroad cars during a train car switching operation. Missouri Pacific asserts several errors, including the claim that the district court erred by instructing the jury that it is a violation of the FSAA "for the railroad to operate a car which had a drawbar sufficiently out of line that it does not couple on impact." We hold that, because Missouri Pacific did not produce evidence that would support a defense based on drawbar misalignment, if we were to adopt such a defense, the instruction is not erroneous in the context of this case. Finding that

defendant's contentions present no reversible error, we affirm.

Facts and Proceedings Below

The facts, for the most part, are undisputed. On February 1, 1981, Maldonado, employed as a switchman by Missouri Pacific, was a member of a four-man crew engaged in switching operations at Missouri Pacific's train yard in Laredo, Texas. The crew was assigned to make up an outbound train by linking specified cars together in accordance with a switch list. In making up this train, the crew was required to switch a TTX flatcar from Track No. 6 to Track No. 4 and to link it up with cars already on Track No. 4. The TTX car was to be the lead car (behind the engine) on the outbound train. The crew planned to

couple the TTX car to the next car on Track No. 4 and then shove the line of connected cars southward down the track to make room for other trains.

The crew went onto Track No. 6 and pulled several cars, including the TTX car, northward onto the main track until they were north of the intersection between the tracks. The engine then came southward on to Track No. 4 with the purpose of "throwing" or "kicking" the TTX car down the track to couple with those cars already on the track. This involved uncoupling the TTX car and using the engine to set the TTX car rolling about four miles per hour toward the next car on the track, which was about a block away. Both cars were equipped with drawbars that had automatic couplers designed to connect upon impact.

Before kicking the TTX car down the track, plaintiff Maldonado observed that the TTX drawbar was properly aligned and he opened the knuckle on the coupler.[1] After the TTX car was sent down the track, Maldonado heard the TTX car strike the next car.

The engine returned the remaining cars to Track No. 6 and then came back to Track No. 4. At this point, the engine coupled with the TTX car by backing directly into it. The engineer then pulled forward or northward to

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1. The evidence established that automatic couplers do not operate unless at least one of the knuckles at the end of the couplers is opened and both drawbars are sufficiently in line to connect. See also Clark v. Kentucky & Indiana Terminal R.R., 728 F.2d 307, 310-11 (6th Cir.1984); United Transportation Union v. Lewis, 711 F.2d 233 (D.C.Cir. 1983); Metcalfe v. Atchison, Topeka & Santa Fe Roy.Co.,491 F.2d 892,296(10th Cir. 1974).

"stretch out" the cars to ensure that they were connected before they were shoved southward. Maldonado noticed that the TTX car had failed to couple to the second car in line and saw that the drawbars on both cars were misaligned. He then aligned the drawbar on the second car. Next, he attempted to align the TTX drawbar, but was unable to do so. He signaled to another crew member who came to assist him. During their concerted efforts to align the TTX drawbar, Maldonado injured his back.

Maldonado filed this action against Missouri Pacific, seeking compensation for his injuries originally under the FSAA and the Federal Employers Liability Act (FELA). Plaintiff dismissed his FELA action during trial, but obtained a favorable jury verdict on his FSAA

claim.

Discussion

Federal Safety Appliance Act

(1)Section 2 of the FSAA, 45 U.S.C. §2, provides:

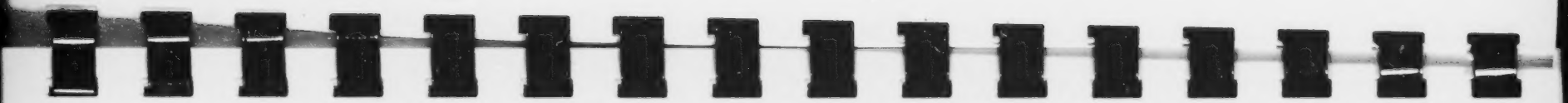
> It shall be unlawful any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessary of men going between the ends of the cars.

The broad purpose of the FSAA was the requirement of equipment for automatic coupling to avoid the great risks incurred by the railroad employees in going between the cars. St. Louis & San Francisco R.R. Co. v. Conarty, 35 S.Ct. 785, 786 (1915); United Transportation v. Lewis, 711 F.2d 233, 243-47 (D.C. Cir. 1983); Southern

Pacific Co. v. Mahl, 406 F.2d 1201, 1203 (5th Cir. 1969). Section 2 imposes absolute liability upon a railroad for injuries sustained when the automatic couplers fail to perform "on the occasion in question." Affolder v. New York, C & St.L.R. Co., 70 S.Ct. 509, 510(1950); Carter v. Atlanta & St. Andrews Bay Ry. Co., 70 S.Ct. 226, 229 (1949). Therefore, neither the diligence of the railroad nor the absence of a specific defect in the coupler is relevant to a finding of liability. Carter, 70 S. Ct. at 229; O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 700 S.Ct. 200, 204(1949); Coleman v. Burlington Northern, Inc.,681 F.2d 542, 544-45(8th Cir. 1982). In fact, no question "regarding the normal efficiency of the couplers" is material to an FSAA action. Affolder, 70 S.Ct. at 510.

(2)The railroads may take comfort, however, in at least one clearly established defense. In Affolder, the Supreme Court stated that failure of the equipment to function is a violation, assuming "that the coupler was placed in a position to operate on impact."Id. at 511; see also Carter, 70 S.Ct. at 229. The Affolder Court thus found that the railroad had a good defense if neither of the couplers was in an open position so as to operate on impact. 70S.Ct. at 511. The courts have been reluctant to extend the general language of Affolder beyond the facts of that case. Therefore, the requirement that the coupler be placed in position to operate has widely been interpreted as referring to the necessity of opening the knuckle on at least one of the couplers. See Clark v. Kentucky &

Indiana Terminal R.R., 728 F.2d 307, 312-13(6th Cir. 1984); Hallada v. Great Northern Ry., 69 N.W.2d 673, 680(Minn.), cert. denied, 76 S.Ct. 119(1955);, White v. Atchison, Topeka & Santa Fe Ry. Co., 244 S.W.2d 26, 28-30(Mo.1951), cert. denied, 72 S.Ct. 648 (1952); Schaaf v. Chesapeake & Ohio Ry. Co., 317 N.W.2d 679, 681(Mich.Ct.App. 1982), cert.denied, 104 S.Ct.153 (1983). Of course, because the FSAA violation must be a causative factor in the plaintiff's injuries, the railroad in appropriate circumstances may raise a sole cause defense. Beimert v. Burlington Northern, Inc., 726 F.2d 412, 414(8th Cir.)(no liability under FSAA if plaintiff's negligence is sole cause of injuries), cert. denied, 104 S.Ct.2659



(1984).[2]

The issue in the present case is whether the district court erred in instruction the jury that it is a violation of the FSAA "for the railroad to operate a car which has a draw bar sufficiently out of line that it does not couple upon impact." Both parties contend that the cars failed to couple because of drawbar misalignment before the impact. Their dispute concerns the legal significance of this theory. Defendant urges us to read Affolder to

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2. In O'Donnell, the Supreme Court stated:

> We do not say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness such, for example, as the work of a saboteur. 70 S.Ct. at 206 n.7.

mean that there can be no FSAA violation unless at least one knuckle was opened and the drawbars were properly aligned before the attempted coupling.[3] However, we need not determine when, if ever, a railroad may rely on drawbar misalignment because Missouri Pacific did not produce the evidence that would be required at a minimum to support such a defense.

(3)We believe that, because the FSAA is essentially an equipment safety statute, drawbar misalignment is due to some factor

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3. Relying on Affolder and Cobb v. Union Ry. denied, 84S.Ct. 352(1963), defendant requested the following instruction:

> You're further instructed that the mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted and aligned as such, automatic couplers must be--as must be, the failure is not that of the coupler.

other than equipment failure or defect. After an extensive examination of the language of the Act and its legislative history, a panel of the D.C. Circuit concluded that section 2 was intended only to prescribe mandatory safety equipment. Lewis, 711 F.2d at 244-45. The court held:

> The scope of section 2 is confined to the requirement that railroad cars be 'equipped' with automatic couplers that can be operated without the necessity of men going between the ends of the cars...The predicate for liability under section 2 is the failure to provide equipment that functions as the statute commands. Id. at 251.

Our examination of the FSAA and its legislative history leads us to agree that the FSAA is equipment oriented and

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Although Affolder amd Cobb both indicate that there can be no violation unless the couplers are "properly set," neither case defines "properly set" to mean properly aligned.

"does not address operationg procedures." Id. at 245; see also Conarty, 355 S.Ct. at 786. This suggests that drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the noncoupling does not reflect defective or failed equipment.

(4)Some courts holding essentially that any misalignment that prevents coupling is a violation apparently assume that proper equipment ordinarily cannot be moved so far out of line that it fails to couple. See, e.g.,Clark,728 F.2d at 312-13(couplers "out of alignment beyond the normal play" will not couple automatically); Hallada, 69 N.W.2d at 680; Buskirk v. Burlington Norhtern, Inc., 431 N.E.2d 410, 412(Ill.App.Ct.), cert. denied, 103 S.Ct.2171982). Whether or not a proper

coupler within normal operation can become misaligned enough to prevent coupling, we believe that, if a railroad may raise a defense of misalignment, it must, at the least, produce evidence tending to show that the misalignment was not due to equipment failure or defect. Evidence that the drawbars were misaligned so as to prevent coupling places a burden on the railroad to produce evidence tending to show a separate cause for the failure to couple. This is so because a failure to couple due to a deficiency in the equipment, such as a drawbar with more lateral play than is appropriate for normal operation, clearly amounts to a violation of the FSAA. Here there is no evidence suggesting a cause or explanation for misalignment of the drawbar (or even that the drawbar was misaligned).[4]

Therefore, we do not have to deicde whether Missouri Pacific, with appropriate evidence, could have raised a defense of misalignment, because Missouri Pacific did not produce any evidence that would sustain an instruction on such a defense. The district court is not free to instruct the jury on an issue of law on which there is no evidence. Neubauer v. City of McAllen, Texas, 766 F.2d 1567, 1575(5th Cir.1985); Ware v. Reed, 709 F.2d 345,352(5th Cir.1983).

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4. Because some courts have held that railroads are responsible for injuries suffered while attempting to align a drawbar in preparation for coupling even though no coupling attempt had been made, see,e.g.,Clark,728 F.2d at 312-13, Missouri Pacific might assert that the impact itself provides a nonequipment cause for the post-impact misalignment. However, Missouri Pacific cannot rely on the impact in this case, because there was no evidence concerning the cause of the proposed misalignment that prevented coupling and thus led to the impact.

Based on the facts of this case, we hold that the district court's instruction is not erroneous.

RULE 606(b)

1. Juror Testimony

Missouri Pacific argues that the district court abused its discretion by denying Missouri Pacific's post-verdict motion to obtain juror testimony pursuant to Rule 606(b) of the Federal Rules of Evidence.[5] Defendant requested leave of

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[5] Fed.R.Evid. 606(b) provides:

Inquiry into validity of verdict or indictment

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other jurors mind or emotions as influencing him to assent to or dissent from the verdict or indictment concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Defendant requested leave of the district court to obtain an affidavit or deposition of Narcisa C. Valdez, who had contacted defense counsel by telephone after the trial to state that the jury had substantial discussions concerning defendant's wealth and about giving the benefit of the doubt to the plaintiff. Defendant sought to procure Valdez's affidavit or testimony to this effect in support of its motion for new trial. The district court denied the motion to obtain testimony and the motion for new trial.

(5)The district court had broad discretion in deciding whether to grant a new

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Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

trial bases on juror misconduct and in the methods used to gather evidence to decide the new trial motion. Carson v. Polley, 689 F.2d 562, 580(5th Cir. 1982); Martinez v. Food City, Inc., 658 F.2d 369, 372(5th Cir. 1981). When a party seeks to impeach a jury's verdict, "evidence on the private thought processes of individual jurors will not be received. The subjective thoughts and emotions that may have influenced a juror's deliberations are shielded from inquiry...Evidence of extraneous matters that may have reached the jury and affected its deliberations, however, may be offered." Id. at 580-81(citations omitted); see also Haeberle v. Texas International Air Lines, 739F.2d 1019, 1021(5th Cir. 1984).

(6)The district court did not abuse its discretion in denying the new trial motion or in denying defendant the opportunity to

obtain a statement from Valdez. Defendant made no suggestion to the court that Valdez would testify concerning any extraneous prejudicial information or outside influence on the jury. Valdez's comments to Missouri Pacific's attorney only concerned matter beyond the scope of proper inquiry. Because the party seeking to question jurors post-verdict must make a "preliminary showing of misconduct," Wilkerson v. Amco Corp., 703F.2d 184,186 (5th Cir. 1983), the court acted within its discretion in denying the inquiry. See also O'Rear v. Fruehauf Corp., 554F.2d 1304, 1309-10(5th Cir. 1977).

Defendant relies upon Vezina v. Theriot Marine Service, Inc., 554F.2d 654 (5th Cir. 1977), a personal injury suit in which we demanded for a hearing to determine if the jury was prejudiced by remarks

made by the forewoman concerning a large personal injury suit pending against her. The forewoman had not disclosed the pending litigation when questioned during voir dire, but disclosed the information during a subsequent voir dire in antoher case. On remand, the district court questioned the jurors and found that the verdict, was free from prejudice, which was affirmed upon appeal. 610F.2d 251, 252(5th Cir. 1980). In Martinez, a case similar to Vezina, we upheld the exclusion of post-verdict evidence of one juror's description of experience with the employment practice at issue and another juror's statements that they jury should find against the employer for hiring Mexican nationals. 658F.2d at 372-73. The district court in Martinez stated that evidence of jury deliberations was inadmissible under

Rule 606(b), but it considered evidence tending to show that a juror had misrepresented or intentionally concealed information during voir dire. On appeal, we distinguished Vezina, because the Vezina trial court initially conducted no inquiry into juror misconduct although a hearing was necessitated by the facts. In Martinez, we found that "once the district court concluded that no concealment had taken place during the voir dire, further inquiry became academic." 658 F.2d at 375.

(7)Missouri Pacific argues that the jurors should have disclosed their prejudices in response to defense counsel's voir dire questions concerning the juror's ability to treat Missouri Pacific like any other individual. However, defendant's motion did not indicate to the district

court that any juror had concealed information during voir dire. Vezina involved circumstances suggestions that a juror had failed to disclose important information about an extraneous matter that could have affected deliberations. In the present case, Missouri Pacific sought to examine the jurors about their subjective thoughts during deliberations. Its motion did not indicate that any juror believed he or she would be unable to treat Missouri Pacific fairly but concealed that fact during voir dire. The testimony sought by Missouri Pacific clearly concerned matters shielded from inquiry by Rule 606(b).

2. **Due Process**

(8)Missouri Pacific further contends that application of Fed. R. Evid. 606(b) violated its due process right to a fair and impartial jury. Defendant argues that

the Rule is designed to prevent harassment of jurors and therefore should not prevent voluntary disclosure of jury misconduct. Of course, jurors may voluntarily disclose any misconduct. But the district court can receive testimony or grant a new trial only if the voluntary disclosure relates to "extraneous prejudicial information" or "outside influence" on the jury, or false information (or withholding) given on voir dire. The subjective thought processes of the jurors generally do not amount to "jury misconduct" that can support a new trial motion.

(9)Rule 606(b) therefore protects jurors from harassment and supports the finality of verdicts. See Carson, 689F.2d at 581; United States v. D'Angelo, 598F.2d 1002, 1004-05(5th Cir. 1979). The defendant's right to a fair trial is not absolute; it

may be outweighed by other considerations, including the jury's right to privacy and protection from harassment. Cf. Haeberle, 739F.2d at 1021-22 (any First Amendment rights litigant may have to interview jurors may be outweighed by other considerations, including jury privacy). In addition, Rule 606(b) also promotes fair trials by encouraging free discussion in the jury room. Rule 606(b) strikes a constitutional balance, protecting the defendant's right to a fair trial from substantial juror misconduct, while protecting other legitimate interests as well.

Closing Argument

Missouri Pacific contends that the district court abused its discretion in denying its motion for new trial based on

plaintiff's improper remarks during closing argument. Plaintiff's counsel suggested during his closing that the jury should give the benefit of the doubt to the working man instead of the corporation. This, of course, was clearly improper. However, the district court immediatley instructed the jury that the plaintiff and defendant should be treated equally.[6] Defendant did not object nor move for mistrial bases on these remarks. In its charge to the jury, the district court stated that a corporation is to be treated equally under the law and is entitled to a fair trial.

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6. The district court explained to the jury:

> All parties in this court, ladies and gentlemen, will be treated as equal. You're not here to give the benefit of the doubt to one person or another, you're here to decide whether one side has proved its case, and I'm going to instruct you that corporation are to be treated exactly as equal as anyone else, and if you do anything to the contrary, you're violating the law.

The court also explained that the plaintiff bears the burden of proving his case.

The district court's refusal to grant a new trial bases on this remark is reviewed under the abuse of discretion standard, because "the trial judge is in the best position to evaluate the impact on the jury of the attorney's conduct, and to determine the most effective response to ensure a fair trial." South Hampton Co. v. Stinnes Corp., 733F.2d 1108, 1123(5th Cir. 1984). Although the remark was wholly improper, the district court immediately informed the jury that corporations are treated as any other party and repeated this admonition in its charge. In somewhat analogous circumstances, we have held that similar action cured any error. See, e.g.,South Hampton at 1123-24;, Dixon v. International Harvester Co.,

754F.2d 573,585-86(5th Cir. 1985). See also Frederick v. Mobil Oil Corp., 765 F.2d 442,449(5th Cir. 1985).

(10)Although the district court instucted the jury before defendant's counsel could have objected, defendant's failure to thereafter move for mistrial may be a factor favoring affirmance. By "acquiescing in the court's corrective charge," defendant "got a chance to see the verdict and then seek to overturn it." Caldarera v. Eastern Airlines, Inc., 705F.2d 778, 782(5th Cir. 1983). Because of the district court's curative instructions, and because defendant chose to gamble on the verdict, we find that the district court correctly denied defendant's motion for new trial.

Limited Cross-Examination

Plaintiff originally sued defendant under the FELA and the FSAA. During trial, at the conclusion of the direct examination of plaintiff, but before defendant's cross-examination of plaintiff, plaintiff's counsel questioned Maldonado about his awareness of Missouri Pacific's safety rules. The district court prohibited much of defendant's cross-examination inquiry into the training, instructions, or knowledge that plaintiff had for the performance of his job and the moving of the drawbars. The district court determined that defense counsel was attempting to elicit evidence of contributory negligence, which was irrevelant to the remaining FSAA claim. Missouri Pacific argues that he should

have been allowed to inquire into all matters raised by direct examination and that the questioning pertained to Maldonado's credibility.

(11)The district court has broad discretion in limiting cross-examination, and its judgment will be disturbed only in instances of clear abuse. Winans v. Rockwell International Corp., 705F.2d 1449, 1457(5th Cir. 1983). As we observed above, it is well settled that evidence of plaintiff's contributory negligence is not relevant in an action based on violation of the FSAA. Affolder v. New York, C. & St. L.R. Co., 70 S.Ct. 509, 510(1950). Furthermore, any relevance that such cross-examination may have had to Maldonado's credibility is minimal. Missouri Pacific was not

prejudiced by the district court's limitation of this cross-examination because defense counsel was permitted some questioning on this matter and was permitted cross-examination about other matters bearing on Maldonado's credibility. Yet, defendant's counsel repeatedly attempted to elicit testimony from Maldonado concerning his training and the care he took that night. Because this evidence was cumulative and its probative value minimal, we conclude that the district court did not abuse its discretion in limiting cross-examination about Maldonado's contributory negligence.

Conclusion

Finding that Missouri Pacific's claims present no reversible error, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Janurary 10, 1985

Maldonado v. Missouri Pacific Railway Company CIVIL ACTION NO. L-82-79

ORDER

QUESTION NO. 1

On the occasion in question, did the couplers on the TTX railroad car fail to automatically couple on impact with the other car?

Answer: "Yes" or "No".

Answer: Yes

If you have answered No. 1 "Yes", Answer No. 2; otherwise do not answer it.

QUESTION NO. 2

Did such failure play any part, no matter how small, in causing injury to the Plaintiff:

Answer: "Yes" or "No".

Answer: Yes

QUESTION NO. 3

At the time Plaintiff was pushing on the drawbar, was it sufficiently misaligned to require straightening before the railroad cars could be coupled?

Answer: "Yes" or "No"

Answer: Yes

If you have answered No. 3 "Yes", answer No. 4; otherwise do not answer it.

QUESTION NO. 4

Did the misaligned drawbar play any part, no matter how small, in causing injury to the Plaintiff?

Answer: "Yes" or "No".

Answer: Yes

QUESTION NO. 5

What sum of money, if any, if paid now in cash, would fairly compensate Enrique Maldonado for his injuries, if any, which resulted from the incident in question? (Plaintiff's burden)

Answer in dollars and cents, if any, with respect to each of the following elements:

a. Physical pain, mental anguish, loss of enjoyment of life from the date of the incident until now.

Answer: $75,000.00

b. Physical pain, mental anguish, and loss of enjoyment of life which in reasonable medical probability he will suffer in the future.

Answer: $225.000.00

c. Loss of earnings from the date of the incident until now.

Answer: $89,000.00

d. Loss of earning capacity wihch in reasonable probability he will sustain in the future.

Answer: $350,000.00

e. The reasonable cost of necessary medical expenses which in reasonable probability will be incurred by him in the future as a result of the injuries caused by the negligence, if any, of the Defendant.

Answer: $108,000.00

_____

FOREMAN

_____

DATE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
January 11, 1985

Maldonado v. Missouri Pacific Railway
Before George P. Kazen No.L-82-79

FINAL JUDGMENT

On January 10, 1985, the jury announced in open court a verdict which would entitle the Plaintiff to a judgment in the sum of $834,000.00. The parties have agreed that the Defendant is entitled to a credit of $12,750.00 against this amount. It is therefore ORDERED that the Plaintiff Enrique Maldonado do have and recover from the Defendant Missouri Pacific Railway Company the sum of $834,250.00. This sum shall bear interst at the rate of 9.08 from this date until paid. Court costs

are taxed to the Defendant.

DONE at Laredo, Texas, this 11th day of January, 1985.

/s/ George P. Kazen
United States District Judge

January 11, 1985

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Missouri Pacific Railroad Company v. Maldonado

Appeal from the United States District Court for the Southern District of Texas, Laredo Division

APPELLANT'S MOTION FOR REHEARING

Donato D. Ramos
P.O. Drawer 6668
602 East Calton Road
Laredo, Texas 78042-6668

ATTORNEYS FOR APPELLANT

Motion For Rehearing

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Maldonado v. Missouri Pacific Railway Company, No. 85-2164

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUDGE OF SAID COURT:

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this Motion for Rehearing pursuant to Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure in that this motion is filed within fourteen (14) days after the entry of a judgment pursuant to an appeal under the provisions of §1291 of Title 28 of the United States Code, being an appeal from a final decision of a district court of the United States.

STATEMENT OF THE ISSUES MERITING PANEL REHEARING

POINT I.

The panel court misapprehended or overlooked Appellant's arguments with regards to its Point of Error that its request for an affidavit or sworn statement be obtained from the juror Valdez in that in seeking such evidence the defendant did not seek to examine the jurors regarding their subjective thoughts, but rather to determine that one or more jurors failed to disclose certain prejudices which were directly inquired into during the voir dire examination, and furthermore, that Appellee's improper argument to the jury during his closing argument was an external and extraneous influence on the jury and thus subject to proper inquiry under Rule 606(b). The application of Rule 606(b) to this testimo-

ny is a violation of the due process rights guaranteed by the Fifth Amendment to the United States Constitution.

POINT II.

The panel court erred in placing the burden of proof on the Appellant to show that the drawbars on the cars in question had not been properly aligned in that the burden of proof was upon Appellee to establish that prior to any attempted coupling that both drawbars be opened, and that in the absence of such a showing there is no Safety Appliance Act violation.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This is an appeal from a judgment for an employee under the Federal Safety Appliance Act (FSAA). A trial to a jury before the United States District Court for the Southern District of Texas, Laredo Division resulted in a

judgement in favor of the Appellee and against the Appellant. The Appellant appealed and on August 27, 1986, this Court affirmed the judgment for the Appellee.

STATEMENT OF FACTS

The Appellee, Enrique Maldonado, was employed as a switchman by the Appellant, Missouri Pacific Railroad Company. He was assigned to switch railroad cars and couple them together so the designated cars were arranged in a specified order in preparation for the making up of a train. Each of the railroad cars in question has a drawbar and each has automatic couplers which are designed to couple on impact. Appellee claims to have been injured when he attempted to straighten a draw-

bar on the second car after an unsuccessful coupling operation. He initially filed an action against Missouri Pacific Railroad Company seeking damages under the Federal Employers' Liability Act (FELA) and also under the Federal Safety Appliance Act (FSAA). After the Appellee testified on direct and he was passed for cross-examination, Appellee's attorney took a non-suit as to the FELA cause of action and pursued strictly on the FSAA claim.

It is significant to note that the Appellee at the trial testified that the drawbar on the TTX car which was kicked to couple with the second car had the knuckle opened on it and the drawbar on the TTX car was properly aligned. It is very significant to note that there is absolutely no evidence in the record which shows that

the drawbar on the second car was ever properly aligned, and in fact, the uncontroverted evidence indicates that the drawbar was misaligned after the attempted coupling, but there is absolutely no evidence to indicate that it was properly aligned prior to the attempted coupling. This fact is significant because there cannot be a successful coupling without two properly aligned drawbars. The Appellee himself testified that had the drawbar on the second car been properly aligned prior to the attempted coupling that there was no reason why there should not have been a successful coupling. The only logical explanation for the cars not coupling being the misalignment on the second car.

After the verdict, a juror called Appellant's counsel and expressed great

concern over the extensive discussion regarding "the relative wealth" of the parties and that the jurors were "sympathetic" to the Appellee. These two precise areas were the subject of voir dire either by the court or by Appellant's counsel, and none of the jurors answered that they had such prejudices.

ARGUMENT AND AUTHORITIES UNDER POINT NUMBER ONE

The panel in its decision states that Appellant's counsel was attempting to impeach the jury's verdict by attempting to get into the subjective thoughts and emotions regarding the jurors' deliberations which are shielded by Rule 606(b). However, Appellant's attempts to get an affidavit from juror Valdez was directed not a getting into the mental processes of the jury's

deliberations, but rather to establish that one or more of the jurors did not disclose in response to questions during voir dire certain prejudices or beliefs which were directly inquired about by Appellant's counsel. Appellant's counsel during voir dire questioned the jury panel with regards to whether they could treat a corporation the same as an individual and likewise that they should not let any sympathy play any part of their deliberations (Tr.p.6), and these are the precise areas that jurors expressed their prejudices in the jury room. The information that Appellant's counsel attempted to solicit from juror Valdez related specifically to statements which establish that in fact one or more jurors let sympathy play a part

of their deliberations and were of the belief that corporations should be treated differently than individuals. Such beliefs are contrary to what was represented to Appellant's counsel during voir dire. The United States Supreme Court in the case of Clark v. United States,289 U.S. 1, 7-18, 53 S.Ct. 465, 77 L.Ed. 993, 1001-1002 (1932) expressly held that if answers to questions during voir dire are willfully evasive or knowlingly untrue, the talisman, when accepted, is a juror in name only. Therefore, any testimony as to the conduct or statements of such a juror during deliberations is not a denial or impairment of any legal statute or privilege. Therefore, the testimony of Narcisa Valdez with regards to a juror or pertaining to a juror who may

have lied during voir dire as to his or her bias or prejudicial statements does not violate Rule 606(b) of the Federal Rules of Evidence. If Rule 606(b) is expanded to protect beliefs or biases not disclosed during voir dire there is absolutely no remedy to counsel when prospective jurors fail to disclose biases, prejudices and beliefs which late are held against a party to the litigation.

The statement made by Appellee's counsel during his closing argument that the jury should "give the benefit of the doubt to the working man instead of to the corporation" is extraneous prejudicial information and outside influences which obviously affected the jury's verdict and thus the subject of inquiry under Rules 606(b). The affidavit of Narcisa Valdez clearly

corroborates that the improper argument of Appellee's counsel was and external influence on the mental processes of the jury and more importantly that the apparent satisfactory instruction given by the court to the jury when the improper jury argument was made by Appellee's counsel was clearly insufficient and inadequate and did not overcome the extraneous prejudicial information and outside influence resulting from the imprope argument of Appellee's counsel. It is obvious that the prejudice created by the improper argument of Appellee's counsel remained even after the apparently sufficient instructions to disregard were given and the courts have held that such instructions are patently inefficacious where the prejudice survives the trial. See Beck

v. Wingsfield, 122 F2d 114, 117 (Third Circuit 1941). This clearly occured in this case. The argument made by Appellee's counsel is plain errorin that it is both obvious and substantial and is corroborated when juror Valdez expressly stated that was the subject of discussion by the jurors.

The Appellant further contends that the extension of the application of Federal Rule of Evidence 606(b) to prohibit the disclosure of facts by Narcisa Valdez of facts which tend to show that one or more jurors lied during voir dire is a violation of the due process rights guaranteed in the Fifth Amendment of the United States Constitution because there is no legal remedy or opportunity for a hearing to review such conduct. The

litigant who is affected by such conduct has nor opportunity to have such wrongful conduct reviewed, and will be deprived of his property without due process of law. The application of Federal Rule of Evidence 606(b) to protect statements made by jurors which clearly show that a juror lied during the voir dire and which information is being obtained, not to get into the thought processes of the jurors, but rather to show that in fact a juror lied during voir dire is a violation of a person's constitutional right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution. Rule 606(b) was designed to prevent juror harassment and promote the finality of verdicts but it was not drafted to

immune or shield jurors who fail to disclose prejudices and biases during voir dire when expressly inquired into by counsel and then seek the protection of Rule 606(b) with regards to said biases and prejudices. The intent of Rule 606(b) is to prevent jurors from impeaching their own verdict, but the intent is not to protect venirement who fail to disclose prejudices and biases during voir dire, and then reveal the prejudices during jury deliberation at a point in the trial where counsel has no remedy or review of their failure to disclose information during voir dire. If Rule 606(b) protects an inquiry into whether or not juror lied during voir dire then this rule effectively eliminates any attempt to review the candidness of a venireman prior to

his or her being selected on the jury, and constitutes a denial of due process. If Rule 606(b) is extended to protect a juror from his failure to disclose prejudices which he should have disclosed during voir dire then a litigant's right to a fair and impartial jury is defeated and constitutes a denial of due process.

The intent of Rule 606(b) was to prevent and encourage finality of verdicts but it was never intended to offer protection from jurors who for whatever reason elect not to disclosed their beliefs, prejudices or biases during vior dire and whose beliefs, prejudices and biases clearly surface in the jury room. A balance must be struck wherein a litigant has a right to be able to

have some review of jurors who fail to disclose biases, beliefs or prejudices during voir dire and the balancing harm which is a result from invading the sanctity of the jury room. This balance however must be struck with some procedure or hearing whereby a litigant can insure that his rights to have his case tried by a fair and impartial jury are properly secured and constitutionally protected.

ARGUMENT AND AUTHORITIES
UNDER POINT NUMBER TWO

The panel court erred in placing the burden of proof on the Appellant to show that the drawbars had not been properly aligned in that the burden of proof in a Federal Safety Appliance Act is upon the plaintiff to prove by a preponderance of the evidence all of the elements of his

cause of action which include not only establishing that both drawbars are properly aligned prior to any attempted coupling but also that the knuckle on at least one of the drawbars is open prior to any attempted coupling.

The undisputed evidence at the trial shows that before a coupling operation can occur that both drawbars have to be properly aligned, and secondly, that a least one of the knuckles on one of the drawbars is open. The plaintiff himself testified to this at the trial of this cause (S.F. p. 503) but there is no evidence that both drawbars were properly aligned. It is the Appellee's contention that in an FSAA case like any other case the burden

is upon the plaintiff to prove each and every one of the prerequisites to a violation of the Act. The burden at all times is on the plaintiff to prove each and every one of the elements of the offense which includes proving that both of the drawbars are properly aligned prior to any attempted coupling operation and that the knuckle on one of the drawbars is open so as to have a successful coupling operation. Anything short of that will be insufficient. The Appellee testified that he only "assumed" that the drawbar on the second car was "on center". (S.F.504). However, there is absolutely no evidence to show that the drawbar on the second car was properly aligned or on center. In fact, on cross-examination

the plaintiff was asked whether he at any time prior to conducting any kicking or shoving operations check the condition of the drawbar on car number two and his response was that it was not his duty and "No I didn't" (S.F. p. 508). The plaintiff further testified that he did not know that the drawbar was in line prior to the attempted coupling (S.F.p.509). The plaintiff further testified that if the drawbars had been "dead center on" then the cars would have coupled (S.F. 510). The evidence is obvious that the plaintiff Appellee failed to meet his burden of proof in showing that both drawbars were properly aligned prior to the time that he attempted the coupling operation that he now claims is the basis for the violation of the Safety Appliance Act.

In the Clark v. Kentucky Indiana Term R.R. case the court held that there was evidence where the jury may have concluded that the couplers were more likely than not to have been properly aligned. In this case, the testimony of the appellee is that had the drawbars been properly aligned there would have been a successful coupling (S.F. 510). A further reading of the Clark v. Kentucky Indiana Term R.R. case at page 311 shows that no violation of the Act can occur unless the couplers were aligned and at least one knuckle was open before the failed impact. The court used the word "couplers" interchangeably with the term "drawbars". A close reading of the Clark case clearly states that although

Affolder and Cobb indicate that there can be no violation unless the couplers are "properly set" the Clark case expressly says that the couplers were aligned and at least one knuckle was open before the failed impact. The term coupler as used in the Affolder and Cobb cases make reference to the drawbars in that when the court says if the "couplers fail to couple automatically" it is referring to the actual drawbars because it is the drawbars which are either aligned or not aligned. The Clark case specifically makes reference to the couplers as being the drawbars and in the Clark case the attorneys for the railroad pointed out there was a finding that the couplers or drawbars were properly

set on the record. The term "properly set" is used in terms of meaning that both drawbars are properly aligned and at least one knuckle is open, because this is the minimum factual prerequisite necessary for a successful coupling operation.

It is the opinion of the undersigned that the court misconstrued the factual basis present in the Maldonado case and the express holding of Clark which recognizes that both drawbars have to be aligned and at least one knuckle open before the attempted coupling and that the existence of those facts is a necessary prerequisite for a plaintiff to establish a violation of the Safety Appliance Act.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant prays that this Honorable Court be reheard and that the district court's judgment be reversed.

Respectfully submitted,

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BORCHERS & MORALES
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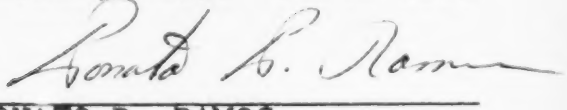

DONATO D. RAMOS

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for Rehearing has been forwarded via ceritified mail, return receipt requested to Mr. Arnulfo Gonzalez, Jr., 1016 Fores, Suite 20, Laredo, Texas, 78040, attorney for Appellee, on the 9th day of September, 1986.

Donato D. Ramos

DONATO D. RAMOS

Order Denying Rehearing

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
October 1, 1986

Maldonado v. Missouri Pacific Railway Company No. 85-2164
Before Randall, Garwood, Circuit Judges, and Schwartz, Jr., *District Judge.

GARWOOD, Circuit Judge.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

FOR THE COURT

United States Circuit Judge

October 1, 1986
DATE

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*District Judge of the Eastern District of Louisiana, sitting by designation.